In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 956

LARRY D. HIBLER AND JUANITA HIBLER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner[1] purchased the assets of a fire, casualty and fidelity insurance agency. He paid $20,000 cash, and agreed to pay the seller 50 per cent of renewal commissions on insurance sold with the aid of the agency's list of policy expiration dates until such payments totaled $70,000. The question is whether the portions of the commissions that petitioner paid to the seller under the agreement were includible in petitioner's own gross income, as the courts below held.[2]

[1] "Petitioner" refers to Larry D. Hibler. Juanita Hibler, his wife, is a party solely because joint returns were filed.

[2] The findings of fact and opinion of the Tax Court are reported at 46 T.C. 663. The *per curiam* affirmance of the Court of Appeals is reported at 383 F. 2d 989.

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The decisions below are correct, and there is no conflict or other ground for further review.

1. Income is taxed to the party who earns it, and this result cannot "be escaped by anticipatory arrangements and contracts however skillfully devised." *Lucas* v. *Earl,* 281 U.S. 111, 115; *Commissioner* v. *P. G. Lake, Inc.,* 356 U.S. 260. And income derived from property will be taxed to the party who owns or controls the property. *Helvering* v. *Horst,* 311 U.S. 112; cf. *Helvering* v. *Eubank,* 311 U.S. 122.

Here the seller acknowledged by contract (R. 7)[3] that he had "bargained, sold and delivered" to petitioner the agency assets, including the expiration lists. Fire, casualty and fidelity insurance coverage (unlike life insurance) does not yield automatic renewal commissions; on expiration of such policies, new coverage must be solicited and sold (R. 12). Thus the transfer of the expiration lists to petitioner was a sale of an asset in the nature of good will. Petitioner's contract required him to "use all reasonable efforts to prevent the loss of such business * * *." (R. 9–10.) The renewal commissions thereafter secured were earnings produced by petitioner's efforts and property and, as such, were includible in his income in their entirety.

The mere fact that a specified portion of the purchase price petitioner agreed to pay was to come out of the future earnings of the business and might extend over a period of time would not allow the Commissioner to treat the payments as ordinary income to the seller. *Commissioner* v. *Brown,* 380 U.S. 563.

[3] "R." refers to the record in the court of appeals.

These same facts should no more allow petitioner to exclude those payments from his income.

2. There is no merit to petitioner's contention (Pet. 4–8) that the decisions below are in conflict with *Thomas* v. *Perkins*, 301 U.S. 655, and other decisions of this Court in the mineral depletion area. Payments made as the result of a transfer of an interest in mineral-producing property, couched in the same terms as petitioner's purchase agreement, might well be ordinary income to the seller and not included in the buyer's gross income. But even on such an assumption it would not follow that the same result should obtain here.

In the depletion provisions, "Congress * * * has recognized the peculiar character of the business of extracting natural resources". *Burton-Sutton Oil Co.* v. *Commissioner*, 328 U.S. 25, 33. The depletion allowance "is based on the theory that the extraction of minerals gradually exhausts the capital investment in the mineral deposit", and "is designed to permit a recoupment of the owner's capital investment in the minerals so that when the minerals are exhausted, the owner's capital is unimpaired." *Commissioner* v. *Southwest Expl. Co.*, 350 U.S. 308, 312. The recoupment thus allowed is an incentive to the investment of risk capital in the development of mineral resources. *Weinert's Estate* v. *Commissioner*, 294 F. 2d 750, 755–756 (C.A. 5).

This Court evolved the "economic interest" concept to govern the allocation of mineral production income, and depletion deductions attributable thereto, among the participants in a mineral venture. A party

holds a depletable "economic interest" if he has acquired an interest in the mineral in place through investment and looks only to income derived from extraction for a recovery of his investment. Thus on a transfer of operating rights in minerals solely in consideration of payments dependent upon extraction, the transferor retains an "economic interest". The payments he receives are his income, subject to the depletion allowance, and are not within the gross income of the transferee. *Palmer* v. *Bender,* 287 U.S. 551; *Thomas* v. *Perkins, supra; Kirby Petroleum Co.* v. *Commissioner,* 326 U.S. 599; *Burton-Sutton Oil Co.* v. *Commissioner, supra.*

Such allocation of depletable gross income under the "economic interest" concept sets the mineral area apart from other contexts where, as in the instant case, income must be allocated in accordance with the rule that earnings are taxable to the party whose efforts or property produced them. The "economic interest" concept has not been extended to transactions outside the mineral area. See *Commissioner* v. *Brown, supra.* Moreover, the insurance expiration lists here involved are not a "wasting asset" comparable to a mineral deposit that will utimately be exhausted by production; so far as petitioner secures policy renewals with the aid of the lists, he retains the patronage of policyholders and there is no diminution of the agency's capital assets.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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